Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

CAROLYN DENISE ANDERSON, Petitioner, vs. ROBERT HOLIFIELD, and LYNNE HOLIFIELD, D.B.A 7-ELEVEN, Respondents	CIVIL NO: Monterey Cnty. Sup. Ct. No. M 24520 Sixth District Court of Appeal: Civil No: H013621 Cal. Supreme Ct. No. S055375

PETITION FOR WRIT OF CERTIORARI

October, 1996 Term

DONALD J. LOFTUS, ESQ.,
Member, U.S. Supreme Court Bar
Attorney for Petitioner
981 Pioneer Rd.
Pebble Beach, California 93953
(408)373-8874

68 pp

Rule 14.1 (a) QUESTION PRESENTED FOR REVIEW:

I. WERE THE REPEATED DISPLAYS OF BIAS AND APPARENT LACK OF COMPENTENCY BY A CALIFORNIA STATE TRIAL JUDGE DURING THE TRIAL OF THIS CIVIL LAWSUIT SUFFICIENTLY EXTREME TO INVOKE PROSCRIPTION UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. SINCE THE STATE OF CALIFORNIA EXPRESSLY RELIES UPON FEDERAL DECISIONS IN INTERPRETING ITS ANTIDISCRIMINATION LAWS, DID THE RECORD EVIDENCE IN THIS CASE SATISFY PETITIONER'S BURDEN OF PROOF OF A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION IN EMPLOYMENT?

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<u>The following were committed by the judge within the full view and hearing of the Jury:</u>
1. During Anderson's counsel's opening remarks the Judge, sua sponte, nonsuited all of Anderson's disability discrimination in employment claims against her employer leaving only her claim that she was wrongfully fired to be tried; 9

2. Later he admonished the Jury not to consider as evidence the employer's admission that he fired Anderson;..... 10
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Rule 14.1(e) BASIS FOR JURISDICTION:

Jurisdiction for Questions I & II, supra, presented by this Petition for a Writ of Certiorari is the following:

> (a) Final Judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where. . . .any title, right, privilege, or immunity is specially set up or claimed under the Constitution or. . . .statutes of. . . the United States." 28 U.S.C. 1257 (a)

Rule 14.1(e)(i): Date of Judgment Sought to Be Reviewed:

The California Supreme Court's denial of Anderson's Petition for Review was entered on October 23, 1996. (See Appendix)

Rule 14.1(f): THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE:

> Basis for Questions I & II, supra:
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws. Article XIV, Section 1, United States Constitution (Emphasis supplied)

Additional Basis for Question II, supra:

The Appellate courts' affirmance of the nonsuits was implicitly based upon federal law.

California Appellate decisions have repeatedly indicated their reliance upon Federal Law and Federal decisions in determining whether a party's burden of proving a prima facie case has been met in an antidiscrimination case such as the instant case.

> Since antidiscrimination objectives and public policy purposes of Title VII and Fair Employment and Housing Act (FEHA) are the same, Court of Appeal may rely on federal decisions to interpret analogous parts of state statute. Civil Rights Act of 1964, s 701 et seq., 42 U.S.C.A. s 2000e et seq.; West's Ann.Cal.Gov. Code s 12900 et seq. Heard v. Lockheed 52 Cal. Rptr. 2d 620 (Sixth Dist., 1996) See also Addy v. Bliss & Glennon 44 Cal.App.4th 205, 51 Cal.Rptr.2d 642 (1996)

The California Supreme Court has noted that California laws proscribing handicap discrimination (the FEHA) is based upon the American Disabilities Act (42 U.S.C. @ 12101 et seq.) (ADA), and also adopts the Federal Rehabilitation Act definition of "handicap" (42 U.S.C. @ 12102; 29 C.F.R. @ 1630.2(g) (1992)). Cassista v. Community Foods, Inc., 5 Cal. 4th 1050; 856 P.2d 1143, 1149 (1993)

Anderson has pressed her claim of error in the nonsuiting of several of her claims of discrimination in employment and cited the above Cassista and Heard cases in support thereof at every stage of this case.

Rule 14.1(g) STATEMENT OF THE CASE:

14.1(i): Stages in the proceedings in which Constitutional issues were raised:

Trial Court: Anderson moved the trial judge to declare a mistrial asserting a denial of her right to a fair trial after he had impugned her character for honesty in front of the Jury, while at the same time complimenting co-defendant Lologo.

Sixth District Court of Appeal: Anderson's Opening Brief Primarily asserted the denial of her due process right to a fair trial by reason of the demonstrated bias and prejudice of the trial Judge and urged that it was error for the Judge to have denied her motion for mistrial. Without reviewing the bias and lack of competency issues raised, the DECISION[1] summarily disposed of these due process issues with a single sentence within its 26 pages.[2]

Anderson then moved the Court of Appeal for Rehearing in accordance with California Rules of Court, Rule 29(b)(2) pointing out the Court's failure to more effectively pass upon the constitutional due process and competency issues. The petition for rehearing was denied by order entered July 31, 1996.

Anderson's Petition for Review before the California Supreme Court again asserted the violation of her due process right to a fair trial as a central

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1 All references to DECISION refer to that of the Sixth District Court of Appeal entered on July 10, 1996 and reproduced in full in the Appendix to this Petition.

2 "As a preliminary matter, we reject out of hand Anderson's claims of court bias. Having considered the entire transcript of this trial, we are convinced that the trial judge went out of his way to be fair and impartial to all litigants, and most especially, to Anderson." Decision P. 6.

issue.[3] Her petition was denied by order entered on October 23, 1996.(See Appendix)

14.1(i): Stages in the proceedings in which Prima Facie Case issues under federal law were raised:

At every stage of this case Anderson has vigorously pressed that she had satisfied (or been prevented from satisfying by the premature sua sponte nonsuit entered against her by the trial judge) her burden of proof of a prima facie case of discrimination in employment in ways other than by termination.

STATEMENT OF FACTS:

PETITIONER/PLAINTIFF in the trial Court, Carolyn Denise Anderson, 25 years of age at the time of trial (RT1283:16) was a young diabetic mother less than 5ft tall (1516:4), who experienced an insulin reaction while working in the cooler (RT1934:7) of a 7-Eleven store in Seaside, California approximately 5 minutes before the end of her shift on October 12, 1991.

At the time of being hired Anderson had alerted her employer, Robert Holifield that in the event of an insulin reaction, administration to her of glucose in the form of sugar, orange juice, etc. would be sufficient to revive her. However, at the time of her insulin reaction Holifield instead searched her person for prescription medication (RT1935:27-1936:2) and failing to find any, had her transported to the local hospital by

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[3] "III. DID THE TRIAL JUDGE'S REPEATED DISPLAY OF BIAS AND OR APPARENT LACK OF COMPETENCY IN THE LAW DENY PLAINTIFF HER CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?"

ambulance. The ambulance personnel immediately revived Anderson and she was released from the hospital's emergency department within 1 hour of her arrival. (RT1294:14-1295:18) Later that same evening, she promptly telephoned Holifield asking if she might return to work. Holifield refused to answer her question, but insisted that she come to his office to talk to him.(RT1294:26-1295:18)

The next morning Anderson went to Mr. Holifield's office where he told her that because of her insulin reaction he did not feel that she was physically able to work at his 7-Eleven store any more. (RT1295:17) When Anderson accused him of firing her because of her diabetes, he responded that before she could return to work she would need to arrange to have her physician contact Mr. Holifield to satisfy his concerns. Holifield admitted the above in his testimony. (RT1565:21-1566:9;1569:18)

Anderson's nurse, M.J. Henderson, testified that in response to Anderson's request she telephoned Mr. Holifield to explain Anderson's diabetic condition to him, however, he seemed to want a guarantee that she would never have another insulin reaction. (RT1437:28)

When she was finally permitted to return to work she was promptly transferred out of the "new" store where Holifield maintained his office to the old store, because according to Holifield he could not stand to see people in pain because it interfered with his doing his work.(P3:3 of Holifield's recorded statement) Further, Holifield admitted Anderson's testimony that she was no longer permitted to work on the cash register or lotto machines but was relegated almost exclusively to unpacking boxes in the "back room" and stocking in the cooler (even though due to her height she needed to stand on a crate to stock many of the

heavy items). When asked on cross-examination why he didn't try to accommodate Anderson by simply assigning her more to the cash register and lotto machine instead of exclusively to the cooler and back room, he responded simply that the latter jobs were part of her job description when she applied and she had not complained.(RT1572:13-1573:2)

Within two weeks after her return to work she was assaulted and battered by Holifield's samoan shift leader, Anne Lologo, who testified that she was aware that Holifield was "watching" Anderson and had been told by his manager in charge of scheduling, Mia Dalton, two weeks earlier (about the time that Anderson came back to work following her insulin reaction) that Anderson was to be fired.

The next morning, November 10, 1991, Anderson met with Holifield and explained Lologo's assault and battery upon her the night before. No sooner had she finished when Holifield told Anderson of his "intent to terminate her". (Rt1563:1-11)

Approximately two weeks after her termination an extensive recorded statement was taken from Holifield with his knowledge by an attorney-private investigator retained by Anderson's counsel in which Holifield admitted firing Anderson, but asserted that the firing was due to employment deficiencies that she demonstrated, some of which he admitted might have been due to her diabetes. Nowhere in this 45 page double spaced statement, in his answer to Anderson's complaint, nor in his response to discovery did he assert that Anderson was prevented from returning to work following her insulin reaction by any other reason than her diabetes. However, at trial he asserted for the first time that a scheduling conflict prevented Anderson's immediate return to work and produced a work schedule which he had failed to previously

produce in response to a request for production in which he had scheduled Anderson to work following November 10, 1991 termination of her in support of his contention that she had merely quit. Holifield admitted that he preferred to have employees quite rather than fire them.[4]

Shortly after November 10, 1991, when Holifield inquired of a disinterested witness, Barbara Spiering, who verified Anderson's version of the Lologo attack, and was asked by Spiering why he was inquiring now when Spiering understood that Anderson had already been fired, Holifield responded:

> "He said to that, We have had other problems with Denise including her diabetes."
> (RT1403:23-1404:8)

Anderson brought suit against Holifield under California's Fair Employment and Housing Act (FEHA) for disability discrimination in employment and against Lologo and Holifield (vicariously) for assault and battery.

Holifield admitted in his answer that he had been advised by Anderson before she was hired about her Diabetes,(CT13) but alleged, in addition to his general denial, as his sole specific defense to Anderson's FEHA claims that she had not been fired.

Although Holifield had not filed any pretrial motions which attempted to summarily dispose of Anderson's above claims alleging specific acts of discrimination against her during her employment and no pretrial discussion about the viability of same had

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4 (Rt1586 examination of Holifield)

19 THE COURT: If you had your druthers, would
20 You rather have somebody quit or fire them?
21 The witness: There is a benefit to them
22 Quitting. I would prefer that they would quit, yes.

taken place, the trial judge (who had previously refused to disqualify himself on the basis of his alleged bias against Plaintiff's counsel) during the early stages of Anderson's case in chief sua sponte nonsuited all of her claims of discrimination save only the question of whether she had been improperly fired by Holifield.

Having left Anderson with solely the issue of whether she had been wrongfully fired to litigate, the trial judge then admonished the Jury that they could not consider as evidence Holifield's admission that he fired Anderson.

The Jury found in favor of Anderson and against Lologo on Anderson's claim for assault and battery against Lologo (the Judge also nonsuited the claim against Holifield for vicarious laibility), but found that Holifield had not fired Anderson, and therefore, did not get to the questions of whether the firing was based in part upon Anderson's disability. (The parties stipulated at the close of trial that Anderson's diabetes qualified as a disability within the FEHA.) By special verdict instruction the Jury, having found that Anderson had not been fired, was then instructed to enter a $0 next to the question inquiring as to the amount of damages she had sustained by reason of Holifield's actions. (See Superior Court Judgment in Appendix)

ARGUMENT:

A. Examples of Trial Judge's display of bias and/or lack of competency which occured duing this trial which lasted only approximately three full days:

The following were committed by the judge within the full view and hearing of the Jury:

1. During Anderson's counsel's opening remarks the Judge, sua sponte, nonsuited all of Anderson's disability discrimination in employment claims against her employer leaving only her claim that she was wrongfully fired to be tried;

California law provides that after Plaintiff completes her opening statement or case in chief a defendant may "move for a judgment of nonsuit". Cal.Civ.Proc. §581c There is no statutory provision permitting a trial judge to sua sponte nonsuit several of plaintiff's claims shortly into her counsel's opening remarks. Yet this is exactly what the trial judge did in this case.

During Plaintiff's counsel's opening statement when he was beginning to state to the Jury what he expected Plaintiff's Physician would testify to with respect to the nature and manifestations of diabetes, and reasonable accommodation options for an employer, he was interrupted and called to side bar by the trial judge where he was told that the Judge would not permit such remarks during opening statement because they were not relevant, the only issue was whether Plaintiff had been fired, and he would not let the doctor testify as Plaintiff's counsel was stating.(RT1254:13-1257:14)

Shortly thereafter during the direct examination of the first witness, Anderson, the Judge refused to permit her to testify about her diabetes declaring he didn't know what kind of lawsuit Anderson's counsel was trying, but that her illness was not an issue in the case.(RT1291:1-1292:19)

A third effective nonsuit took place when the Judge interrupted Anderson's attempted examination of her physician, but this time loudly on the record in

front of the Jury and told them that the testimony would not be permitted because the only issue was whether Plaintiff had been fired.(RT1430:25-1433:27)

Ignoring the above premature nonsuits the Court of Appeal's Decision notes:

> "Finally, Anderson argues that Holifield criticized 'her performance problems which were related to her diabetes.' However, she has not shown how the performance problems were related to diabetes."(Decision p. 12)

2. Later he admonished the Jury not to consider as evidence the employer's admission that he fired Anderson;

During cross-examination Holifield acknowledged as correct a portion of his statement in which he admitted firing Plaintiff. 1550

Cross-examination of Holifield by Mr. Loftus;

Q. Do you recall this question being asked of you and your giving this answer: Question: Okay. The basic question is why was she fired?
Your answer: Lack of performance. Her performance was not acceptable to the standard that I expect of the employees and it was deteriorating.
Do you recall that question being asked and your giving that answer?
A. That's the question that was asked. That's the answer I gave but it's not complete in itself.
Q. That was on page 1, first question. I'm going to ask, sir, if you recall this is on page 12?
THE COURT: This is of the same unsworn statement that you're talking about?
MR. LOFTUS: Yes, Your Honor.
THE COURT: Come to the sidebar.

During final argument, however, when Plaintiff's counsel attempted to refer to the above admission the Court again interrupted and chastised Plaintiff's counsel and told the Jury not to consider the above statement as evidence:

Final Argument by Mr. Loftus:

And Mr. Holifield took the position I did not terminate her. And one of the first things we did was ask him about, the first -- when he was asked, first question, okay, basic

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question, why was she fired? His answer: Lack of performance. Her performance was not acceptable to the standard I expect of the employee.

MR. Mr. Cayce: Objection, Your Honor.

THE COURT: Sustained.

MR. LOFTUS: Sorry. I thought that was in the record, Your Honor.

(FOLLOWING HELD AT SIDE BAR)

THE COURT: Are you reading from the transcript?

MR. LOFTUS: Just paraphrasing it.

MR. Cayce: He says I'm sorry. I'm appalled by this. It is improper.

MR. LOFTUS: It was testified to in almost those exact words. It's in the evidence.

THE COURT: But that was not all he said.

MR. LOFTUS: No.

THE COURT: You are taking it out of context totally.

MR. LOFTUS: I don't think so, Your Honor. I'm sorry. The words are right there. It's not out of context. It's the first question that was asked him and the first

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answer that was given, period, and that's it.
MR. Cayce: He's reading out of this thing like it's a piece of evidence.
THE COURT: And it is not.
MR. LOFTUS: It is not evidence and I wasn't --
THE COURT: You will not be permitted to read from it.
MR. LOFTUS: Very well.

(CONCLUSION OF SIDE BAR DISCUSSION)

THE COURT: Counsel has been instructed not to read from that document as if it is a piece of evidence because it is not a piece of evidence, and the jury is to use their memory as to what the testimony was, not anyone else's.
Proceed, counsel.
MR. LOFTUS: Thank you, Your Honor, very much. I'm sorry for the error.

The jury thereafter found in answer to special verdict question that Anderson had not been fired. (See Appendix)

3. Without any basis in the record, repeatedly made statements & gestures to the Jury designed to impugn Anderson's credibility;

3.a. Repeated told the Jury or strongly implied that Anderson was being untruthful when there was no basis for his feelings:

Holifield's counsel Mr. Cayce first cross-examined Plaintiff following her direct examination (RT1324) and then again following her re-direct examination (RT1393). After an intervening witness had testified (Mrs. Spiering RT1397:24) Judge Curtis recalled Plaintiff to the witness stand and permitted "pro per" defendant Lologo to examine Plaintiff (RT1411:6).

Thereafter, over objection Holifield's counsel was permitted to cross-examine Plaintiff for the third time.(RT1417) When Mr. Cayce repeatedly went beyond the scope of Lologo's examination, an appropriate objection was made, at which point the Court made the following statement loudly in front of the Jury:

Cross-examination of Anderson by Mr. Cayce:

RT1417:

Q. At a quarter to 7:00 your husband showed up?
A. Yes. I believe it was, yes.
Q. Did you call him to come?
MR. LOFTUS: This is far beyond cross-examination. This is new territory.
THE COURT: **Counsel, I am going to permit this because this is -- each time this woman testifies, it's the Court's observation that the story changes a little bit, and this -- we are here to seek the truth.**

Earlier, while defense counsel was permitted over Plaintiff's Cal. Evidence Code §352 objection to examine Plaintiff with respect to a deferred conviction

of a felony which had been expunged, Judge Curtis had made an equally egregious comment against Plaintiff's credibility:

Cross-examination of Anderson by Mr. Cayce:

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13 Q. Read the question 2.8. Have you ever been convicte
14 of a felony? If so, for each conviction state -- this
15 is the answer. What was your answer to that question
16 on that document?
17 A. To what, to this? I'm sorry. I'm really trying to
18 understand.
19 Q. What was your answer to the question?
20 MR. LOFTUS: I object. It's already been
21 stated in the record what that answer is.
22 THE COURT: You know, she's testified part
23 of the time that she has never seen this document
24 before, which is somewhat curious, then she doesn't
25 remember.

Plaintiff's oral motion for mistrial (RT1511:21) based upon the first above remark was denied. (RT1516:19). Counsel suggested to the Court an admonishment to the Jury (which was not given), although expressing doubt that it would cure the prejudicial effect of the Court's statement.(RT1511:14)

3.b. Made buffoonish facial and hand gestures to the Jury expressing the Judge's disbelief while Anderson was testifying:

Shortly before making the first of the prejudicial remarks set forth under 3.a., supra, Judge Curtis in full view of the Jury put both of his hands up in front of his face and shook his head in disbelief while Anderson was being cross-examined for the third time by

Holifield's counsel despite the fact that the questions were confusing and Anderson's responses clearly reasonable, consistent and proper.(RT1516:5)

3.c. Despite Holifield's admission that Anderson told him about her diabetes **before** she was hired, the judge repeatedly gave the Jury contrary admonitions implicating a fraudulent withholding of same by her:

Holifield admitted in his answer, Anderson's allegation that she advised him of her diabetes before she was hired. (CT13par2) Denise so testified at the trial (RT1289:2), and one of Holifield's managers, Maya Dalton, testified that she told him about Anderson's diabetes long before Anderson ever applied for the job (RT1837:23). However, the Judge's bias apparently caused him to see some type of fraudulent withholding of knowledge about her diabetes by Anderson and he repeatedly made such accusatory statements in front of the Jury: (RT1555:11-1556:2)

Cross-Examination of Holifield by Mr. Loftus:

21 BY MR. LOFTUS: Q. Was your employment
22 of Denise conditional of her on some representation to
23 you that her diabetes would not affect her employment
24 duties?
25 A. Ask your question again, please.
26 THE COURT: Wait, wait. Counsel, what is
27 before the Court is that she was hired. She started
28 before they knew that she was diabetic. This is what
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1 she testified to. She didn't say anything until the
2 second day.

3.d. Repeatedly criticized Anderson's testimony before the Jury in an angry, accusatory and arrogant manner;

(RT1317) Direct Examination of Anderson by Mr. Loftus:

Q. I mean after this conversation with Maya, you tried to go back to work?
A. The next morning.
MR. CAYCE: I object on the basis of vague and ambiguous.
THE COURT: It is non-responsive. His question was, after your conversation with Maya, did you attempt to go back to work that evening. He's not talking about the next morning. What did you do after you had the conversation with Maya? I think that probably would be -- that gets to it quicker.

(RT1339) Cross Examination of Anderson by Cayce:

BY MR. CAYCE: Q. After the insulin reaction on October 12 -- that was the incident?
A. Yes.
Q. -- were you then subsequently allowed to go back to work for the Holifields?
A. After I had to -- he told me to get in contact with the nurse or the doctor.
THE COURT: **We're going to change the rules here a little bit. We're going to go back to the way trials are supposed to be conducted. He's going to ask the question and you're going to answer the question he asks. You're not -- I want the answer to be responsive.**
THE WITNESS: You mean like yes or no?
THE COURT: Yes. ...

RT1371:Examination by Cayce:

20 Q. Did you go there for treatment for the bruise?
21 A. I showed her my bruise and stuff and I told her what
22 had happened.
23 Q. Is that why you went to Dr. Holtz' office is because
24 of the bruise?
25 A. I had showed her that and also --
26 THE COURT: Wait. Remember we agreed that
27 you were going to answer the question that he was
28 asking.
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1 THE WITNESS: I'm sorry.

4. Forced Anderson to admit to being convicted of a felony notwithstanding that the certified record presented to him clearly proved that she was not;

In a macabre scene that most Americans assume could only occur in barbaric, totalitarian countries, an innocent prisoner is browbeaten into confessing to a crime that she didn't commit. However, in the trial of this case, Judge Curtis with the ready assistance of Holifield's counsel coerced Anderson by the use of scowling faces and threatening voices in front of the Jury into changing her testimony from her assertion that she had never been convicted of a felony to admitting that she had, while at the same time forcing her to breach her attorney-client privilege and chilling her counsel's objections.

Anderson had erroneously answered an interrogatory indicating that she had been convicted of a felony, when in fact she had not. A later amended answer along with certified declarations and records satisfied the trial judge that there had been a deferment of conviction which had been

expunged.(CT230-234) The Court determined that in fact the matter had been expunged in Texas similar to an expungment in the State of California. (RTf1070:5;1073:4) Under Cal. Ev. Code 788 a witness may not be examined about an expunged criminal matter.

Over a Cal.Civ.Proc. §352 objection, and without any balancing or weighing or probativeness vs. prejudice in violation of his judicial duty (the trial judge nevertheless permitted defense counsel to examine Anderson on the subject and to brand her a convicted felon before the Jury. (RT1024:23-1036:24;RT1330:8-1335:18;RT1986:1-24))

The Court of Appeal noting the clear fact that there had been no conviction (Decision pp 23-24) recognized that the allowance of the cross-examination of Plaintiff by defense counsel on a deferred adjudication of guilt which had been expunged was error. (DECISION P.24) The court of appeal then proceeded to make the same elementary evidentiary mistake that the trial Judge made (RT1030:21), viz., it assumed that because the erroneous answer had been given by Plaintiff to an interrogatory, it was ipso facto admissible notwithstanding a CCP §352 objection, towit: Since her initial response was properly admitted into evidence, her supplemental response was also admissible." (DECISION P.24) (Emphasis supplied)

The Sixth District had previously held:

> Upon proper objection to admission of prior felony conviction for purposes of impeachment in civil case, trial court is bound to perform weighing function and balance possibility of prejudice and probative value of evidence.

Robbins v. Schmelzer 27 Cal.App.4th 261, 32 Cal.Rptr.2d 337 (1994)

As Anderson queried in her opening Appellant's brief, what probativeness was there in offering her eroneous answer into evidence and of browbeating her into admitting that she had been convicted when she never was, or of not listing on her application a conviction that never took place?

The Court of Appeal Decision reveals its impression that the fact that Anderson's counsel was then forced to inform the Jury of the deferment and expungement somehow cured the error. However, the California Supreme Court had made it clear that in such a case an injured party may attempt to reduce the sting of such an error while preserving the objection on appeal as a basis for reversal. People v. Turner, 50 Cal. 3d 668, at 704; 789 P.2d 887 (1990).

5. Forced Anderson to violate her attorney-client privilege;

Apparently unable to comprehend what the Court of Appeal had noted, namely, that Anderson had never been convicted, the trial Judge actually forced her to reveal her communications to her counsel which led to her erroneous answer to the interrogatory:

Cross-examination of Anderson by Mr. Cayce: RT1333:

BY MR. CAYCE: Q. How did that information get put in that response to the interrogatories?
A. I don't understand your question.
THE COURT: Wait, wait. That's a very direct question: How did your lawyer know that about that information? That's a very direct question. Did you tell him?

1334

THE WITNESS: I told him that I was back in Lufkin and something happened, yes.
THE COURT: All right. Next question.
BY MR. CAYCE: Q. Did you tell him that you were convicted of a burglary?
A. I told him that I was an accessory to it.
MR. LOFTUS: Can I have a continuing objection?
THE COURT: All right, what?
MR. LOFTUS: A continuing objection, Your Honor, to this line of questioning.
THE COURT: Counsel, I told you that I assumed there was a continuing objection. I have ruled on it and I have also indicated through gestures and words that a further objection in this subject area is not necessary or appropriate. Next question.

6. Made blatantly defense favorable comments

Cross-Examination of Holifield by Mr. Loftus:

BY MR. LOFTUS: Q. Did you make any effort on your own part to independently obtain some medical information so that you could make a determination as to whether Denise should return to work for you?
MR. CAYCE: Objection. It's argumentative and irrelevant.
THE COURT: He has no duty. If he has no duty, is it material?

Cross-Examination of Holifield by Mr. Loftus:

1569:

BY MR. LOFTUS: Q. You would not let her come back to work for you until she took the time and effort to go to her health care provider and had

7 them make some type of communication to you that met
8 your satisfaction?
9 THE COURT: If he answers it, yes, you don't
10 have anything that means anything. If the answer is,
11 no, you don't have anything because of the form of the
12 question.
13 Rephrase it.

7. Repeatedly refused to permit Anderson's counsel to use a prior statement of Holifield as his admission pursuant to California Evidence Code §1220

Holifield's statement, which he admitted to be accurate, (see also RT1598:28; 1599:20) contained many critical admissions which were in diametric opposition to his testimony from the witness stand.

Plaintiff's counsel repeatedly advised the Court that a prior statement of a party defendant should come in as an admission under Evidence Code §1220, but was prevented from effectively using Holifield's statement by the Judge.

First, Judge Curtis would not permit Holifield to authenticate the statement. (RT1549:23). Later the Judge indicated that the tape must be authenticated only through the investigator, and, astoundingly, indicated that Holifield had not participated in the making of his own tape recorded statement. (RT1551:5-1551:22)

On every other attempt by Plaintiff's counsel to introduce portions of the statement he was promptly cut off by the Court on erroneous grounds:
1. "Its not fair" (RT1550:4-1552:26; RT1591:9-21) even though such an ascription is irrelevant to the use of valid evidence. Miranda v. National Emergency Services, 35 Cal. App. 4th 894. (Fifth, Dist., 1995)
2. "Not under oath" (RT1550:22-1551:4; 1590:26)

3. Use only to impeach. (RT1590:26)
4. Use only to refresh recollection. (RT1598:26)

It is apparent from the foregoing that the trial judge was not able to distinguish a prior statement of a **party** admissible under Cal. Evidence Code §1220, from **non party witness** declarations against interest per Cal. Evidence Code §1230 and **non party witness** inconsistent statements per Cal. Evidence Code §1235.

8. Refused to permit Anderson's physician to testify as to the nature and manifestations of her diabetes and accommodation options available to her employer on the grounds that it was irrelevant;

Although the trial Judge limited Anderson's opening remarks and refused to permit her physician to testify he repeatedly permitted defense counsel to cross-examine her with technical medical questions about her diabetes that should only have been asked of Dr. Keller [5] and, amazingly, the trial judge

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(1324 Examination of Plaintiff by Mr. Cayce)
17 Q. And as long as you took it on a regular basis, then
18 you wouldn't have any problems performing the job at
19 7-Eleven?
20 A. I don't understand what you --
21 MR. LOFTUS: It calls for a medical opinion.
22 THE COURT: Overruled. She would know what
23 she is able to do or not to do. She's been taking
24 medicine since she was 12.
25 Next question, or what was the answer?
26 BY MR. CAYCE: Q. As long as you took
27 your medication as instructed to do by your physician,
28 you would be able to perform the job at the 7-Eleven
1325
1 just like anybody else; is that correct?

volunteered his own medical opinion testimony (1557:22-1558:6), and finally, gave an instruction with a non-pled affirmative defense that if Anderson was fired due to her diabetes, Holifield would not be liable if the termination was "because she could not perform those duties in a manner which would not endanger her health or safety or the health or safety of others".(CT299) but refused to even read much less give her pretext instruction.

How could the Jury be expected to respond to the above without Dr. Keller's testimony? And how could Holifield be given this defense when he admittedly knew nothing about Plaintiff's disability and the Judge admonished the Jury that he had no duty to acquire such knowledge (RTRT1567:18)? Exclusion of Plaintiff's doctor's testimony on Plaintiff's disability was clearly motivated either by the Judge's bias or unfamiliarity with the pleadings and trial briefs, or both, and was by itself a miscarriage of Justice requiring a reversal. People v. Mcdonald, 37 Cal. 3d 351; 690 P.2d 709, 726-727 (1984)

9. Ignominiously ordered Anderson's Phd Clinical Psychologist from the witness stand on the Judge's sua sponte determination, sans any evidence, that too much time had elapsed

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2 A. You mean like if I took my insulin and stuff?
3 Q. Yes.
Examination of Plaintiff by Mr. Cayce:
28 Q. You don't have any special reaction to colds just
1351
1 because of your diabetic condition, do you?
2 A. What do you mean by special?
3 Q. I mean your colds don't get worse because of your
4 diabetic condition.
5 A. It takes me longer to get over them.

between Anderson's firing and her examination to enable the psychologist to form opinions;

Although Plaintiff's complaint alleged psychological injuries resulting from both the assault and battery and each act of discrimination, the trial ignominiously ordered Plaintiff's Phd. Clinical Psychologist, Dr. Marra from the witness stand, sans any evidence, based upon the Court's sua sponte determination that too much time had elapsed between the harmful event and Dr. Marra's examination to allow him to form valid psychological opinions. (RT1504:26-1518:3) Remoteness in time goes to the weight to be given to evidence, not to its admissibility. Stenger v. Anderson 429 P.2d 164, 171 (Sup.Ct., 1967)

10. Sua sponte admonished the Jury not to consider co- defendant Lologo's recorded statement as evidence against the employer.

After reluctantly agreeing to permit the tape recorded statement of Lologo to be played for the Jury (RT 1537:19) in violation of Evidence Code §355, (Which requires a request by a party) Judge Curtis, sua sponte, decided to instruct the Jury that they could not consider defendant employee Lologo's statement as evidence against the Holifield's and did so.

In Lologo's statement she stated that she had heard from Holifield's manager in charge of making the schedules that Anderson was to be fired at about the time that Anderson returned to work following her insulin reaction. Further, her testimony that Anderson was not on the Schedule that she looked at the night of her assault and battery upon Anderson, together with her failure to mention anything about having received

a "notice of nonperformance" from Holifield were all important items of impeachment of Holifields testimony from a person identified with him in interest in the lawsuit. Cal. Evidence Code §776 D.

Outside the presence of the Jury the Judge:

11. Responded to Anderson's counsel's respectful suggestion that he was disqualified because of bias by improperly continuing the trial and ordering counsel to immediately prepare and file a written "motion to disqualify" not permitted by California law;

As soon as Anderson's counsel discovered that her case had been assigned to Judge Curtis he respectfully suggested to the Judge that the Judge was disqualified for cause to preside over the case because of the Judge's demonstrated hostility and bias toward counsel in a previous matter. The Judge's response was to sua sponte continue the trial thus forcing Anderson and her mother to make another round trip from their homes in Arkansas, and ordering her counsel race back to his office, a 50 mile round trip, to the court house and to file a written "motion to disqualify" the Judge.

It was proper for Petitioner's Counsel to respectfully orally suggest to Judge Curtis that he was disqualified under CCP § 170.1, and for Judge Curtis to then indicate whether he was refusing to recuse himself. The statutory scheme then left it solely to the discretion of Anderson's Counsel and Anderson to decide whether they wished to file a written "statement of grounds for disqualification" and to incur the resulting delay and expense or to proceed to trial,

notwithstanding their reservations about the impartiality of the trial judge.

12. Refused to permit Anderson's counsel to voir dire the jury in order to obtain information that would be helpful in exercising her peremptory challenges;

Judge Curtis interrupted Anderson's counsel's voir dire and admonished that only questions designed to challenge for cause could be asked by Plaintiff's counsel on voir dire. (RT1120:27-1123:10)

CCP §222.5 provides:

Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct examination, any of the prospective jurors **in order to enable counsel to intelligently exercise both peremptory challenges** and challenges for cause. (Emphasis supplied)

13. Refused to review Plaintiff's counsel's tendered Jury instructions, indicating that he had no duty to do so in civil cases.

The trial judge refused to even read, much less give, any of Anderson's requested instructions, and in particular her pretext instruction (RT1059:7) saying he had no responsibility to do so in a civil case (1788:20). Cal. Code of Civ. Pro. §607a imposes a duty upon the court , upon request of counsel to review proposed instructions.

14. Nonsuited Anderson's claim against Holifield for vicarious liability for the assault and

battery by Lologo despite strong evidence of ratification;

After her assault and battery upon Anderson, Holifield gave Lologo a $40 bonus for the week ending with the assault and battery, but denied it to Anderson.(RT1576:6-1577:5) In addition, his admission was allowed into evidence that he terminated Anderson on the morning following the assault and battery. (Rt1563) There was also evidence of his repeated attempts to blame Anderson for the altercation. This should have been more than sufficient evidence of ratification to an unbiased judge to have permitted Anderson's claim of Holifield's vicarious liability to go to the Jury.

B. Court of Appeal for the Sixth District failed to apply the proper rules enunciated by federal decisions for determining whether Anderson had made a prima facie case of disability discrimination particularly in light of the trial judge's premature sua sponte nonsuit of most of her claims.

In this case, by alleging (and then proving) that she engaged in a protected activity (problem experienced with her disability) shortly before the adverse actions of her employer complained of, Anderson presents a prima facie case that the adverse actions were retaliatory in nature. Holifield's feeble and self-contradictory explanations latched onto by the Court of Appeal, and disregarding all evidence and inferences to the contrary) then presented Plaintiff with the opportunity to have the matter submitted to the Jury on the grounds that his assertions were merely a pretext for his admitted "intent to terminate her". Heard v. Lockheed 52 Cal Rptr. 2d 620 (Sixth Dist., 1996) ;

See also, Ortez v. Washington County, 88 F.3d 804 (Ninth Cir., 1996)

Instead the Court of Appeal, after stating the correct standard of review on an appeal from a nonsuit, applied it in reverse by disreguarding all evidence in support of the nonsuited claims.

C. Applicable Federal Law

Petitioner's counsel's research has failed to disclose any U.S. Supreme Court decision in which the Court has assumed jurisdiction over a State Civil lawsuit to address the bias and competency issues presented in this Petition for Writ of Certiori.

However, the U.S. Supreme Court has exercised jurisdiction over a civil State lawsuit and vacated and remanded where it found a deprivation of a party's due process right under the Fourteenth Amendment to a fair trial was violated by the potential bias or prejudice of the trial judge. Aetna Life Insurance Co. V. Lavoie, 475 U.S. 813, 106 S.CT. 1580) And although the Aetna Court stated the rule that "only in most extreme cases of bias or prejudice is disqualification of judge constitutionally required" Petitioner respectfully submits that the facts of this case demonstrate a violation of her constitutional rights to a fair trial by actions and statements of the trial judge that were far more egregious than the business interest of the Judge in Aetna.

Further, even though the Supreme Court of California has not specifically "passed" upon the issues raised herein which were vigerously "pressed" before it by Anderson in her Petition for review, its denial of review, coupled with the Sixth District Court of Appeal's clear ratification of all the trial judges errors of gives the Supreme Court jurisdiction to review the Judgement in relation to the federal claim. New York

Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964); Wolfe v. North Carolina, 364 U.S. 177, 80 S. Ct. 1482 (1960).

CONCLUSION

The mean spirited nature in which the trial judge together with defense counsel browbeat Anderson into admitting to being convicted of a felony when she never was, and then forcing her to violate her attorney-client privilege while the trial judge chilled her attorney's intervention "through gestures and words that a further objection in this subject area is not necessary or appropriate" (RT1334:14) should alarm any American, lawyer or lay person, who looks upon the United States of America as a country where the rule of law prevails to protect the fundamental civil rights of its citizens.

The words of the Sixth District Court of Appeal in its unpublished opinion that "Having considered the entire transcript of this trial, we are convinced that the trial judge went out of his way to be fair and impartial to all litigants, and most especially, to Anderson." (Decision p.16) coupled with the California Supreme courts denial of Denise's Petition for review clearly place the stamp of approval of the State of California on the trial judges repeated violations of Denise's constitutional rights to a fair trial.

Like the astronomical "black hole", however, the California Judicial System has so far collapsed in upon itself through its unpublished opinions so as to preclude any knowledge of the judicial abuses that Denise Anderson has sustained herein from being seen and addressed by the legal and non-legal minds of the State of California and the rest of America.

Only the U.S. Supreme Court's granting of Anderson's petition for writ of certiorari and a resulting review and remand for a new trial before a different judge can redress a violation of constitutional rights that strikes at the very fabric of the American Judicial System.

Dated: January 21, 1997

RESPECTFULLY SUBMITTED,

DONALD J. LOFTUS, ESQ.
Attorney for Petitioner
981 Pioneer Rd.
Pebble Beach, California 93953
Phone:408-373-8874

APPENDIX

DONALD J. LOFTUS
State Bar No. 150417
99 Pacific St., Suite 200l
Monterey, CA 93940

Telephone: (408) 373-8874

Attorney for Plaintiff,
CAROLYN DENISE ANDERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

CAROLYN DENISE ANDERSON, **Plaintiff,** **v.** **ROBERT HOLIFIELD and Lynne HOLIFIELD, d.b.a. 7-Eleven, and ANNE LOLOGO,** **Defendants.**	Case No: M 24520 **JUDGMENT**

This action came on regularly for trial on September 26, 1994, with Plaintiff Carolyn Denise Anderson appearing in person and by Donald J. Loftus, her Attorney, and defendants Robert Holifield and Lynnee Holifield appearing in person and by Christopher C. Cayce, their Attorney, and defendant Anne Lologo, appearing In Pro Per. A jury of 12 persons was duly impaneled and sworn;

witnesses were sworn and testified; and after being duly instructed by the court, the jury deliberated and thereon duly returned the following special verdict:

"Question No. 1: Did the Defendant Robert Holifield terminate the employment of the plaintiff?

Answer: No.

If you answer question number 1 no, proceed to question number 4 and place a zero on line a and on line b.

Question No. 4: What do you find to be the amount of damages, including economic and non-economic damages, if any, suffered by the plaintiff caused by the conduct of the defendants Robert Holifield or Lynnee Holifield?

Answer: 0.

Question No. 5: Did plaintiff suffer apprehension of harmful or offensive contact?

Answer: Yes.

Question No. 6: Did the defendant Anne Lologo Intend to cause plaintiff to have apprehension of harmful or offensive contact resulting in damage to plaintiff?

Answer: Yes.

Question No. 7: Did the conduct of defendant Anne Lologo legally cause damage to the plaintiff?

Answer: Yes.

Question No. 8: Did the defendant Anne Lologo willfully and unlawfully use force or violence on the plaintiff?

Answer: Yes.

Question No. 9: Did the defendant Anne Lologo's behavior legally cause damage to the plaintiff?

Answer: Yes.

Question No. 10: What did you find to be the amount of damages, including economic and non-economic damages, if any, suffered by the plaintiff caused by the conduct of the defendant Anne Lologo?

Answer: Non-economic damages $2,700."

It appearing that by reason of the above special verdict that Plaintiff is entitled to judgment against defendant Lologo for damages and for costs, and that defendants Holifield are entitled to a judgment in their favor and an award of costs against Plaintiff;

NOW, THEREFORE, IT IS ADJUDGED AND ORDERED that Plaintiff recover from Defendant Lologo the sum of $2700 plus taxable costs of the lawsuit according to statute.

IT IS FURTHER ADJUDGED AND ORDERED that judgment be and is hereby entered in favor of Defendants Robert Holifield and Lynne Holifield on Plaintiff's remaining cause of action against them, respectively, and that they be awarded their taxable costs of this lawsuit against Plaintiff.

Dated: November 8, 1994.

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William D. Curtis
Judge of the Superior Court

Anderson v. Holifield: Case No. M 24520

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CAROLYN DENISE ANDERSON, Appellant, v. ROBERT HOLIFIELD and LYNNE HOLIFIELD, D.B.A. 7-ELEVEN, Respondents.	CIVIL NO: H013621 (MONTEREY COUNTY SUPER. CT.No. M24520)

Plaintiff Carolyn Denise Anderson appeals from a judgment in favor of her former employer[1] in this disability discrimination action. She contends the court erred in granting nonsuit on two of her causes of action and in refusing to allow her to amend her complaint to add a third cause of action. She also contends the defense judgment on the remaining cause of action resulted from erroneous evidentiary rulings and bias of the part of the trial judge. We shall affirm the judgment.

1 In this same action, plaintiff also sued a fellow worker, Anne Lologo, for assault and battery. She prevailed in her cause of action against Lologo, and no appeal has been taken from that judgment.

FACTS

A. Evidence Presented in Plaintiff's Case-in-chief

Defendant Robert Holifield and his wife Lynne own and operate two 7-Eleven stores in Seaside, California. On September 9, 1991, Anderson applied to work at the stores. She stated on her application that she did not "have any physical condition or handicap which may limit your ability to perform the job for which you are applying" and had not "been convicted of a criminal offense within the past seven years." She was hired effective September 26, 1991.

"[W]ithin the first day of employment," Anderson told Holifield she had diabetes, but it should not interfere with her work. She kept glucose tablets with her in case her insulin levels went down. On October 12, 1991, approximately 10 minutes before the end of her shift, Anderson suffered an insulin reaction. Holifield found her on the floor, incoherent and disoriented. He looked in her purse for glucose tablets. After not finding any, he called 911. Anderson was taken away in an ambulance to Community Hospital of Monterey. "[B]ased on the fact that she had departed or been taken from the premises in an ambulance," Holifield "had to adjust her work schedule for the balance of the week...."

Later that night or the next day, Anderson called Holifield and told hem she was ready to return to work. Holifield was concerned and asked for written medical assurance that it would be safe for Anderson to return to work. The next day Anderson's nurse called Holifield on the phone and assured him that Anderson

was capable of returning to work. He specifically asked whether it would be safe for Anderson to work in the cooler, where the temperature was 34 degrees. He was assured that "hypothermia would not be a problem." He also talked to Anderson who told him she was able to return to work.

At this point, "when she was again available" Holifield "placed [her] back on a work schedule. [P] This is not something that we accomplish on the spur of the moment; you're on or you're off. Once an adjustment is made, it does take some time to readjust, but she was returned to work as soon as possible." In fact, Anderson was back at work on October 15, 1991, just two and a half days after suffering her insulin attack.

Anderson's job duties at the two stores included: "Sales clerk and stocker, mopping, doing the cooler, front facing, running register, mopping floors, cleaning rugs. Basically everything." She worked at the "new store" the two and on-half weeks before suffering the insulin reaction. There she primarily ran the cash register and lotto machine. When she returned to work on October 15, 1991, however, she worked more at the "old store," "front facing" merchandise in the aisles and in the cooler. She spent less time at the cash register.

Despite the assurances of Anderson's nurse, Holifield was still concerned about Anderson's safety at work. He advised all of his employees what to do if Anderson had an insulin reaction, and he told them to look for her if "she was not seen over a period exceeding 15 minutes, to look for her to ensure her

welfare and safety." Holifield was aware that Anderson might need to take more breaks because of her diabetes, and "permission [was] given to do this." Over the next several weeks, Anderson was out of sight for over 15 minutes on numerous occasions. Co-workers, going to look for her, would often find her sitting on a crate in the cooler, smoking a cigarette. They reported these incidents to Holifield.

Holifield was becoming increasingly dissatisfied with Anderson's performance. There were occasions when he would ask her to do some task that needed to be done. "She was spending more and more time standing or I would find her sitting in the back room, and when I asked if she was okay, she was just taking a short break. I said, okay, when you finish, would you please take care of this. [P] This escalated over a period of time that breaks were more and more frequent and longer and she was walking past obviously what was a spill or something that needed to be cleaned and doing nothing about it." At this point, Holifield prepared a "Notification of Nonperformance," which he intended to give to Anderson November 11, 1991.

On November 9, 1991, Anderson worked at the "old store" with Anne Lologo, an employee with approximately 60 days seniority over Anderson. Lologo had heard rumors for about two weeks that Anderson was going to be fired. She testified that on that day the floors were particularly dirty and that clean floor were a priority for Holifield. Therefore she asked Anderson to mop the floor. When Anderson did not do

so after repeated requests, Lologo became angry and screamed, "mop the f_____ floor!"
Anderson responded in a raised voice, "I'm getting a little tired of this. I don't have to take this off you . . . ." Lologo then threw a carton of cigarettes at her. Anderson ran to the phone to call her husband; Lologo grabbed the phone from Anderson and may have hit her. The assault was witnessed by a 7-Eleven customer.

The witness, Barbara Spiering, went into the back room to check on Anderson. She found her there with a bleeding hand. Anderson was on the phone with her supervisor, Maya Dalton, reporting the assault. She asked Spiering if she would talk to Maya and tell her what Lologo had done. She also told Spiering the Lologo was not her supervisor. Shortly thereafter, Anderson went home.

The next day Anderson went to Holifield's office to report on what had happened the night before. Holifield had heard about the altercation with Lologo and wondered what Anderson might have done to precipitate it. After Anderson had finished telling her account of what happened and after Holifield explained what he intended to do about it,[2] Holifield changed the topic: he proceeded to discuss problems he had with Anderson's job performance. Before he was able to give her the notice of nonperformance he had prepared, however, she accused him of firing her because of her diabetes. He allegedly denied he was firing her, but she became irate, called him names, and

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2 One of the things he did was to issue a notice of nonperformance to Lologo.

left the office. She had worked for Holifield just under seven weeks at the time.

Anderson told her aunt that she was fired on account of her diabetes, and he aunt so testified at trial.

B. Procedural History

Anderson's complaint alleged the following causes of action against Holifield: (1) disability discrimination by termination and by acts other that termination; (2) vicarious liability for Lologo's assault and batter upon plaintiff; and (3) defamation. Anderson sought compensatory and punitive damages from Holifield, the latter predicated upon Holifield's "fraud, oppression, or malice."

At the conclusion of Anderson's case-in-chief, Anderson withdrew the cause of action for defamation. Holifield then moved for nonsuit on the remaining causes of action. The court agreed that Anderson had presented no evidence of disability discrimination against plaintiff in ways other than by termination, and that she had presented no evidence that would make Holifield vicariously liable for Lologo's assault. The court also found no evidence of fraud, oppression or malice. However, the court allowed Anderson to proceed on her cause of action against Holifield for disability discrimination leading to wrongful termination.

At the same time, Anderson sought to amend her complaint to state a cause of action for invasion of privacy based on Holifield's (1) telling his employees about Anderson's diabetic condition so that they would know how to accommodate her

disability and (2) discussing her diabetes with the woman who had witnessed Lologo's assault and battery. As Anderson had personally made her diabetic condition, and how to treat it, known, the court refused to allow the amendment.

Subsequently, the case proceeded on Anderson's cause of action against Lologo for assault and battery and her cause of action against holifield for disability discrimination leading to wrongful termination. In a special verdict, the jury found that Holifield did not terminate Anderson's employment, that Anderson suffered $0 in damages caused by the conduct of Holifield, that Lologo did assault and batter Anderson, and that Anderson suffered $2,700 in damages caused by the conduct of Lologo. Anderson timely appealed.

DISCUSSION

A. Nonsuit Issues

1. Standard of Review

"A motion for nonsuit allows a defendant to test the sufficiency of the plaintiff's evidence before presenting his or her case. Because a successful nonsuit precludes submission of plaintiff's case to the jury, courts grant motions for nonsuit only under very limited circumstances. [Citation.]
(Carson v. Facilities Development Co. (1984) 36 Cal.3d 830, 838.)

In determining whether there is evidence of sufficient substantiality to support a judgment in plaintiff's favor, the court must disregard conflicting

evidence and give to plaintiff's evidence "'all the value to which it is legally entitled, . . .
indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor. . . .' [Citation.]" (Campbell v. General Motors Corp. (1982) 32 Cal.3d 112, 118.) The court must not weight the evidence or judge the credibility of witnesses. (Ibid.)

"In reviewing a grant of nonsuit, we are 'guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' [Citation.]" (Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 291; see also Loral Corp. v. Moyes (1985) 174 Cal.App.3d 268, 272.)[3]

2. Contentions

(a) Disability Discrimination by Acts Other Than Termination

Anderson argues that the court erred in granting nonsuit on her claim of "disability discrimination by acts other than termination." (Capitalization omitted.) Specifically, she contends the evidence shows Holifield (1) denied her the right to return to work after her insulin reaction (2) conditioned her right to return on obtaining medical clearance; (3) "took [her] off [the] cash register and kept her in [the] cooler most of the time" (capitalization omitted); and (4) criticized her performance problems which were related to her diabetes.

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[3] The trial judge made it abundantly clear that he knew and was applying the correct standard of review. The court stated: "if there is any evidence, if there is any evidence, by the plaintiff or whoever, then it should go to the jury. [P] I'm not going to rule on the credibility of plaintiff." (Emphasis added.)

We disagree. Based on the entire transcript, we are convinced, as was the trial court, that no facts substantiate Anderson's claim of disability discrimination. On October 12, 1991, Anderson was taken away from her work in an ambulance. She had been found on the floor, disoriented. She clearly was not in a position where she could wait on customers, stock shelves, and mop floors. Because she left at the end of her shift and there was not way of determining when she would be able to return, Holifield revised his work schedule by having other employees cover the shifts that had been planned for Anderson. When Anderson asked to return and a nurse verified it would not endanger her health if she returned, Holifield immediately adjusted his work schedule to accommodate her. She was off work just two days.

There is no evidence that this de minimis two-day absence from work was based on Anderson's disability. Rather the evidence suggests that the two-day absence was based on Anderson's unavailability, which resulted in Holifield having to change the work schedule to have other employees cover Anderson's shifts, and the resultant delay in adjusting the work schedule a second time. Employees who were told to work on Anderson's shifts clearly would have to be notified that they were no longer needed to work on those shifts. We are persuaded that this was treated like any other emergency situation would have been. It would have taken time to place Anderson back on the work schedule if, for example, she had had to leave

work because one of her parents was critically ill, Holifield had adjusted the schedule to accommodate her, then she changed her mind and decided to return to work. There is simply no evidence that Holifield kept Anderson from work because she was a diabetic.

Anderson also contends Holifield wrongfully kept her from work by demanding a written medical clearance. This demand "imposed [a] financial and time obligation upon" (capitalization omitted) her, was a "denial . . . of an employment benefit, namely, the right to immediately return to work," and was a violation of the Fair Employment Housing Commission's rule requiring an employer to "'make reasonable accommodation to the physical handicap of any handicapped individual.'" (Quoting Cal. Code Regs., tit. 2, no. 7293-9.) However, neither the facts nor the law support Anderson's claim. While Holifield did ask for a written medical release, the evidence shows he allowed her to return to work without one. (He got oral assurance from someone identifying herself as Anderson's nurse.) Nor does this record show that getting a written medical release would have resulted in any financial or time obligation on Anderson's part. She was transported to the Community Hospital of Monterey by ambulance and saw medical personnel there. Surely, the Community Hospital Personnel could have provided her, without additional cost, the requisite medical release, if they deemed a release medically appropriate. No financial or time obligation was expected or demanded.

Furthermore, there is no absolute "right to immediately return to work" irrespective of the person's physical or mental ability to perform the job. Although the Fair Employment and Housing Act (FEHA) is silent on an employer's rights and obligations in the situation where an employee is taken away from work in an ambulance,[4] the Americans with Disabilities Act (ADA) provides some guidance in an analogous provision dealing with medical testing and inquiries during employment. That provision prohibits an employer from requiring a medical examination or inquiring into whether an employee has a disability unless doing so is "shown to be job-related and consistent with business necessity." (ADA § 102(c)(4)(A); 42 U.S.C., § 12112 (c) (4) (A).)

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4 The Fair Employment and Housing Commission's regulations do not, and cannot, deal with every conceivable situation that involves an employer and an employee with disabilities. The entire regulations take up a mere three pages int he California Code of Regulations. (See, Cal. Code Regs., tit. 2, nos. 7293.5-7294.2.)

The regulations do provide, with respect to per-employment practices, that an employer may inquire into "the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others." (Cal. Code Regs., tit. 2,
no. 7294.0 (b) (3).)

In addition, the regulations provide that it is "a permissible defense for an employer or other covered entity to demonstrate that after reasonable accommodation the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk tot he applicant or employee." (Cal.
Code Regs., tit. 2, no. 7293.8(c).)

The facts here show that employees of the two Holifield stores need to be able to stock food in a 34 degree cooler, to mop dirty floors, and to assist customers. When Anderson was taken to Community Hospital, she was on the floor, disoriented and incoherent -- clearly unable to do any of her job functions. Under these circumstances, it was reasonable, and not forbidden, in inquire "consistent with business necessity" whether Anderson could perform her job functions without jeopardizing her health and safety.

Anderson also complains that Holifield wrongfully "took [her] off [the] cash register and kept her in [the] cooler most of the time." (Capitalization omitted.) However, again, the facts do not support her claim. Anderson's job included a variety of tasks at the two stores. One of those tasks was "front facing" items in the cooler. Holifield had specifically asked Anderson's nurse whether Anderson's diabetes posed any additional threat of hypothermia if she performed this required job function. He was assured it would pose "no problem." Additionally, it appears that much of the time Anderson was in the cooler was due to her own volition: she took breaks in the cooler and smoked her cigarettes there. This claim has no merit.

Finally, Anderson argues that Holifield criticized "her performance problems which were related to her diabetes." However, she has not shown how the performance problems were related to diabetes. Although Holifield testified that Anderson's "diabetes may have played a part in what I perceive as declining performance," the actual performance problems he

outlined were unrelated to any disability. Holifield testified there were times he would ask Anderson to do a particular task and she would say she would do it late, but it never got done. He testified she would walk by spills and other situations needing immediate attention without taking any remedial action. He testified she took frequent breaks longer than 15 minutes at which time she was found sitting on a crate, smoking. While he had authorized her to take breaks whenever necessary to eat and stabilize her insulin levels, he had not authorized additional breaks for smoking. In short, there was no evidence presented that Holifield criticized Anderson's job performance problems related to her diabetes.

(b) Vicarious Liability

Anderson contends the court should not have granted nonsuit on her cause of action against Holifield for assault and battery. She points out that under Government Code Section 12940, subdivision (h) (1), an employer is strictly liable for harassment of an employee because of physical disability by the employee's supervisor.[5] She also claims the evidence shows, or would have shown,[6] that Lologo was plaintiff's supervisor.

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5 Government Code Section 12940 states in relevant part: "It shall be an unlawful employment practice, . . . [P] (h) (1) For an employer, . . . because of . . . physical disablity, . . . to harass an employee . . . . Harassment of an employee . . . by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."

6 Anderson contends the court erred in not admitting into evidence a 45-page transcript of a private investigator's interview with

"Under [the] FEHA, an employer is 'strictly liable for the harassing conduct of its agents and supervisors.' [Citation.]" (Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 608, fn. 6) On the other hand, "[t]he standard for coworker liability is that an employer is liable where it, its agent or supervisors "knows or should have known of this conduct and fails to take immediate and appropriate corrective action."' [Citation.]" (Ibid.)

The evidence, including that cited in footnote 6, does not support Anderson's claim that Lologo was her supervisor. Anderson was adamant about the fact that Lologo was not her supervisor and thus had no right to tell her what to do. After all, Lologo was a new employee herself, having worked for Holifield only two months longer than Anderson. Anderson told Barbara Spiering, the customer who witnessed Lologo's attack, that Lologo was not her supervisor. And she immediately reported the incident to the person who was her supervisor, Maya Dalton. She also attempted to contact Holifield, but could not reach him.

In any work situation, one coworker will be more experienced or have more seniority than another

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Holifield. In that transcript, Holifield stated, "Anne [Lologo] was the cashier on duty and Denise [Anderson] was He also said, "When we have someone like Denise who is a part time employee, they are, in effect, the employee's supervisor when they are out there on the floor. And if the cashier says, 'would you get me some paper sacks, please, or some cigarettes from the back room or 'Denise, there's something down there that needs to be cleaned up' [t]hen she should, in turn, respond, because that's the senior person on the job." ()

worker, unless both were hired at the same time. This does not convert the coworker with the assistant . . . . She was supposed to do what she was asked . seniority into a supervisor of the other worker. Nor does expecting a worker with less seniority to follow the lead of the worker with more seniority result in a supervisor-employee relationship. There is insufficient evidence in this record that Lologo was Anderson's supervisor.

For an employer to be held vicariously liable for the acts of a nonsupervisorial employee, the plaintiff must prove the employer knew or should have known of the conduct or that the employer ratified the conduct. (Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal.App.4th 397, 417.) This record shows neither. Holifield had not actual knowledge, prior to the incident, or Lologo's predilection toward violence. Furthermore, there was no evidence presented that Holifield should have known that Lologo might attack a fellow employee (e.g., that she had a criminal assault record or that she had attacked others in the past). Nor was there any evidence that Holifield ratified Lologo's conduct. To the contrary, he issued Lologo a notice of nonperformance after the incident. Under these circumstances, the court did not err in granting nonsuit on Anderson's cause of action against Holifield for assault and battery.

Finally, the court properly concluded that Anderson was not entitled to an award of punitive damages as there was no evidence of ratification of Lologo's acts and no evidence that Holifield was personally guilty of fraud, oppression, or malice.

B. Wrongful Termination Judgment Issues

Anderson contends the defense judgment on the disability discrimination/wrongful termination cause of action must be set aside due to erroneously admitted, excluded or limited evidence, and due to the trial court's bias. As a preliminary matter, we reject out of hand Anderson's claims of court bias. Having considered the entire transcript of this trial, we are convinced that the trial judge went out of his way to be fair and impartial to all litigants, and most especially, to Anderson. Her other claims, with the exception of one, are also without merit. Accordingly, we see no reason to upset the jury's verdict.

In reviewing the sufficiency of the evidence on appeal, all conflicts must be resolved in favor of the prevailing party and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. "It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deducted from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429.)

Anderson's principal argument is that the court should have admitted into evidence a tape recording of and a 45-page transcript of Holifield's unsworn interview with her private investigator. In the interview taken less than two weeks after the incident, the

investigator began, "we're here to talk about the dismissal of Denise Anderson. [P] Okay, basic question, why was she fired?" Holifield answered, "Lack of performance. Her performance was not acceptable to the standards that I expect of the employees and it was deteriorating." Anderson contends this was an admission by Holifield that he in fact fired her. Holifield also told the investigator that he had advised his wife not to put Anderson on the schedule because he intended to give her a notice of nonperformance and intent to terminate. In addition, in the interview Holifield discussed the chain of command as set forth in footnote 6. Anderson contends it was prejudicial error to exclude this interview with her investigator.

A reading of the transcript, however, shows that Anderson's counsel was not precluded from introducing any of Holifield's alleged admissions or inconsistencies into the record. The court told Anderson's counsel to ask Holifield, "Did you ever say to anyone such and such a thing?" Admissions or inconsistencies could come out in this manner. But the court felt that wholesale admission of the 45-page transcript would be unduly time-consuming and would be unfair because Holifield was not given the opportunity to explain his responses as he could on the witness stand. (Evid. Code, § 352) Furthermore, most of the 45-page transcript was not relevant, as acknowledged by Anderson's counsel ("There is only a couple of short portions" and "There are specific items I want to examine the witness on"). As the court gave counsel every opportunity to examine Holifield on prior

inconsistent statements and admissions, it was not error to exclude the statement itself as evidence.

The court did allow into evidence, however, the much shorter interview (11 pages) that the private investigator conducted with Lologo on November 22, 1991. Anderson argues the court erred in limiting the jury"s consideration of Lologo's responses. Specifically, the court instructed the jury it could not consider Lologo's responses as against the employer. Lologo stated in her interview that she was the "shift leader" on the night of the incident and that she had heard for a couple of weeks that Anderson was going to be fired. Anderson argues that the former statement is relevant to the issue of whether Holifield should be vicariously liable for the acts of his supervisors, and that the latter statement is relevant to the issue of whether Anderson was terminated. As to the vicarious liability issue, Lologo's statement was that she was "like the shift leader" that night. She did not say she was the "shift leader" or what a "shift leader" might be. When Anderson's private investigator then asked, "so she was supposed to do what you told her to do?," Lologo responded, "Well, she was supposed to do backup." Nothing in this statement, in our view, supports Anderson's contention that Lologo was Anderson's supervisor. Thus, There was no prejudice to Anderson from the court's ruling not allowing the jury to consider the statement as against Holifield.

As to the termination issue, Lologo stated that she had heard for two weeks that Anderson was going to get fired. When asked who she had heard it from, Lologo responded, "I seen the schedule. . . . She was

not on the schedule at all. [That told me] [t]hat she was fired and plus everybody's been talking about [it]. . . . Because, like I said, when I went there and checked my schedule and everybody had been talking about how bad her performance was and we even talked, you know, I even heard from the lady, Mia, that she's gonna go and see Bob the very next day, Sunday." Later she said that when she went to pick up her schedule on Saturday, "Mia" (presumably Maya Dalton) said Anderson "was gonna get fired." The statements "everybody had been talking about" it, Maya said Anderson was "gonna et fired" are clearly hearsay.

In addition to being hearsay, Maya's alleged statements are inconsistent and do not support the proposition that Holifield had already decided to terminate Anderson. Maya stated she was going to talk to "Bob" (Holifield) the very next day, Sunday, about terminating Anderson. Yet she also allegedly stated that Anderson "was gonna get fired." Anderson contends these statements are admissible against Holifield under the hearsay exception for party admissions, Evidence Code section 1220. However, these statements are too ambiguous to be construed as admissions. They do not indicate whether Holifield had any role in the alleged imminent termination or even whether he was aware of the pertinent facts. Nor is there any statement in the record that Maya had the authority to unilaterally, without Holifield's knowledge or consent, terminate employees. Lologo and Holifield were on the witness stand and could be examined on these issues at that time. In addition, Maya Dalton

could have been called as a witness. Since the alleged hearsay statements did not implicate any prior knowledge on the part of Holifield, the court did not err in limiting the jury's consideration of Lologo's statement.

Anderson next complains that the court erred in not admitting into evidence Lologo's prior deposition. However, the court allowed Anderson's counsel to ask her questions to ferret out any prior inconsistent statements and any admissions. The court stated, "Why don't you just ask questions, Counsel, and if she gives a different answer, then impeach her with that. . . ." When counsel responded that he wished to use the deposition as an admission as well, the court permitted it, stating, "All right. I became more aggressive. Ask your questions and see if she makes the same alleged admissions of the stand." If counsel did not ask all the questions he could have asked, this was not the fault of the trial judge.

Anderson also faults the trial court for excluding any mention of Holifield's franchisor, the Southland Corporation. She contends that mentioning the franchisor was relevant to the issue of motive. Specifically, Southland does unannounced "spot checks" of various franchises to see if they are clean and well stocked and to see if the employees are courteous. Awards are given to stores that make an especially good impression. Anderson alleges that having a diabetic employee might not look good. However, the evidence showed that Holifield previously had a diabetic employee at his stores and Anderson has not shown how her presence would

reflect badly upon the store. Furthermore, Anderson had earlier dismissed her action with prejudice against the Southland Corporation. Under these circumstances, the court determined that the probative value of this evidence would be outweighed by the prejudicial effect (of the jury assuming that a "deep pocket" could compensate Anderson). We find no error.

Anderson next argues that the court erred in limiting the testimony of her physician on the attributes of diabetes and in limiting the testimony of a psychologist she saw two times several years after she stopped working for Holifield. The court made the first ruling based on the premise that Holifield was not contesting that diabetes was a disability within the meaning of the FEHA. When Holifield attempted to argue that the diabetes was not a disability, the court threatened to allow Anderson to recall her witness. At that point, Holifield conceded the issue. Thus, it was no longer in controversy. The second ruling, limiting the testimony of the psychologist, was based on remoteness. While as a general rule, remoteness goes to the weight of evidence rather than its admissibility (Casey v. Casey (1950) 97 Cal.App. 875), we find no abuse of discretion or prejudice here. The psychologist's testimony was relevant to the issue of the damages Anderson suffered as a result of her alleged wrongful termination. However, since the jury determined that Anderson was not terminated, the issue of damages is moot.

Anderson also contends she should have been able to cal Holifield's attorney to the stand to explain

an omission from a response to a request for production of documents. Specifically, Holifield was asked to produce "All records, notes, memorandum, computer data that you have [been] referring in any way to Carolyn Denise Anderson." In response, Holifield submitted 12 categories of documents that related to Anderson. However, Holifield did not include among these documents his weekly work schedules, which listed all of his employees and the hours they were scheduled to work. Later at trial, Holifield introduced into evidence two work schedules for the week ending November 17- - the first showing that Anderson was scheduled to work from 3 p.m. to 6 p.m. on November 12, from 3 p.m. to 11 p.m. on November 13, from 3 p.m. to 11 p.m. on November 14, from 3 p.m. to 6 p.m. on November 15, from 3 p.m. to 6 p.m. on November 12, and from 6 a.m. to 2 p.m. on November 16, and the second removing her from the schedule. Anderson's counsel asked Holifield why these work schedules were not produced, and Holifield responded "I'm sure they weren't but ---" At that point, counsel ceased asking Holifield further questions about this topic, stating "I think that's sufficient. I have no further questions." The following day, counsel sought to examine Holifield's counsel. The court responded, "On cross-examination, you asked the defendant whether or not that information was contained in the packet. . . . [P]
He said, no, it was not. . . . [P] And that gives you the basis to argue it and kind of questions as to whether or not it's a recently fabricated document. . . . [P] I was kind of surprised that you let it drop the way you did.

You do have enough. I figured, well, okay, he's going to argue it. I thought you would gave gone a little further with Mr. Holifield as to why it wasn't there." The court then ruled it would not allow the further examination of Holifield's counsel. We find no error in this ruling. It was incumbent upon Anderson to fully impeach Holifield with a prior inconsistent statement. Anderson chose not to do so.

Finally, Anderson argues that the court erred in allowing in, for a limited purpose, evidence of an alleged former conviction. We agree, but conclude that any error was harmless.

It appears that in 1987, Anderson committed a residential burglary in the state of Texas. She pleaded "guilty." The minutes of the District court of Angelina county dated August 28, 1987, state: "The trial proceeded before the Court, and after the evidence was submitted and the argument of counsel thereon, the Court found that such evidence substantiates the Defendant's guilt in the cause, and further found that the best interests of society and the defendant would be served by placing the Defendant on probation and by deferring proceedings without entering an adjudication of guilt in this cause." (Italics added.) She was placed on probation. Later, In 1993, after satisfactory completion of probation, Anderson was "released from all penalties and disabilities resulting from" the prior ruling ordering probation and deferment of adjudication of guilt. Thus, she was never "convicted."

On her employment application, Anderson stated she had not been convicted of a crime in the last

seven years. In a discovery response in this case, however, she stated she had been convicted of burglary in Texas in 1987. Later, she submitted a supplemental discovery response, stating the facts as noted above. The court permitted Holifield to introduce into evidence Anderson's employment application and her initial and supplemental discovery responses. The court admonished the jury, however, that it could consider the evidence only for the limited purpose of determining whether Anderson was being truthful when she filled out her employment application. It could not be used to test her credibility generally. The court's ruling was apparently predicated on its belief that Anderson had been convicted of burglary in 1987 and that the burglary was not expunged from her record until 1993. In fact, the adjudication of her guilt was deferred, so there never was a conviction.

However, we discern no prejudice from the admission of this evidence. Holifield was permitted to introduce into evidence admissions made by Anderson in her discovery responses. (See e.g., D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1.) And in a discovery response, Anderson admitted she had a felony conviction. She was mistaken in her admission, however, and tried to rectify the error by explaining the entire course of legal proceedings in her supplemental response. Since her initial response was properly admitted into evidence, her supplemental response was also admissible. Under these circumstances, even if it were error to have admitted this evidence for the purpose of testing her credibility when she filled out her employment application, there

is no reasonable likelihood that a more favorable result would have been reached absent the error. (Soule v. General Motors Corp. (1984) 8 Cal.4th 548, 574.)

C. Amendment Issues

At the conclusion of Anderson's case-in-chief, Anderson sought leave of the court to amend her complaint to include a cause of action for invasion of privacy under the Confidentiality of Medical Information Act. Civil Code section 56.20 provides, in pertinent part, "(c) No employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer possesses pertaining to its employees without the patient having first signed an authorization under Section 56.11 or Section 56.21 permitting such use or disclosure, except as follows. . . . " (Emphasis added.) "Medical information" is defined in Civil Code section 56.05, subdivision (b), as "any individually identifiable information in possession of or derived from a provider of health care regarding a patient's medical history mental or physical condition, or treatment."

The information Holifield received regarding Anderson's diabetes, however, was not "in the possession of or derived from a provider of health car" but rather was derived from Anderson herself, who freely divulged her diabetic condition to third parties. Thus, Holifield did not disclose medical information as it is defined in the act. Furthermore, the very name of the act, the Confidentiality of Medical Information Act, suggests that its purpose is to protect confidentiality.

Where, as here, an individual freely discloses to third parties her medical condition, confidentiality is not implicated. Accordingly, the court did not err in denying Anderson's motion for leave to amend her complaint.

DISPOSITION

The judgment is affirmed.

Sixth Appellate Disrict No. HO13621
SO055373

IN THE SUPREME COURT OF CALIFORNIA

CAROLYN DENISE ANDERSON, Appellant

v.

ROBERT HOLIFIELD et al., Respondents

Petition for review DENIED.

(Supreme Court, FILED, Oct 23, 1996,
Robert Wandruff Clerk)

GEORGE
Chief Justice

Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

(2)

No. 96-1182

In The

Supreme Court of the United States

October Term, 1996

CAROLYN DENISE ANDERSON,

Petitioner,

v.

ROBERT HOLIFIELD, and LYNNE HOLIFIELD, d.b.a. 7-Eleven, ANNE LOLOGO,

Respondents.

On Petition For Writ Of Certiorari To The California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

CHRISTOPHER C. CAYCE
Member U.S. Supreme Court Bar
Counsel of Record for Respondents, Robert Holifield, and Lynne Holifield, d.b.a. 7-Eleven
200 E. Franklin Street, Suite 250
Monterey, CA 93940
(408) 373-2610

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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OPPOSITION BRIEF TO PETITION FOR WRIT OF CERTIORARI

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Supreme Court of the State of California.

STATEMENT OF JURISDICTION

The Judgment of the Supreme Court of the State of California was entered on October 23, 1996. The Petition for a Writ of Certiorari was filed on January 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This matter involved an employee who was hired by the Respondents Robert and Lynne Holifield to work as a part-time sales clerk and stocker in both Respondent Holifields' 7-11 franchises in Seaside, California. (Reporter's Transcript, hereinafter "RT," 1926:23-28; RT 1930:9-16) Petitioner has diabetes.

Petitioner worked in Respondents Holifields' stores for approximately 2 months from early September, 1991 to November, 9, 1991 at which time she quit. (RT 1613:5-1614:7)

Prior to Petitioner quitting her job, she suffered an insulin reaction while working. (RT 1566:4-7) Because Mr. Holifield could not locate Petitioner's glucose tablets, he called an ambulance and she was transported to the hospital. (RT 1566:10-12) Subsequently, Mr. Holifield

requested that Petitioner obtain some type of medical clearance that she was healthy and could return to work. (RT 1567:6-9) After he obtained some assurance, and based on his own observation that Petitioner was healthy (RT 1571:16-23) Mr. Holifield immediately placed her back on the work schedule. (RT 1571:9)

The day before Petitioner quit working she was involved in an altercation with a co-worker, Respondent, Anne Lologo, at one of the stores. As a result of the altercation, Petitioner claimed damages due to injuries.

The following day, Petitioner went to speak with Respondent Mr. Holifield regarding the incident. In addition to his intention to gather information regarding the incident, Mr. Holifield had also intended to speak with Petitioner regarding potential problem areas in relation to her work performance. (RT 1602:26-1603:5 and 1606:21-1607:9) After Respondent Mr. Holifield had spoken to Petitioner about the incident (RT 1611:18-1612:17) he proceeded to discuss with her some areas of concern that he had regarding her work performance. She immediately began to accuse him of firing her because she was a diabetic. (RT 1612:14) Mr. Holifield said that he was not firing her. Petitioner then became irate, used profanity and left the office. At no time was she terminated.

Subsequently, Petitioner brought this action for discrimination and harassment, assault and battery, and defamation. During the argument of Respondents' attorney's motion for nonsuit at the close of Petitioner's case, Petitioner withdrew the cause of action for defamation. (RT 1783:10-11) Therefore, the only issues that were presented to the jury were based on two causes of action, the first

being discrimination based on a physical disability by termination and non-termination activities against the Holifields; and the second cause of action for assault and battery against Lologo and the Holifields.

The jury found that the Petitioner had not been actually or constructively terminated by Respondents. The jury further found that Respondents Holifields were not vicariously liable for the actions of their employee for assault and battery.

Petitioner sought review by the Sixth District Court of Appeal asserting approximately 40 separate errors committed by the trial court. The Court of Appeal affirmed the trial court's decision on July 10, 1996. Petitioner than requested a rehearing by the Court of Appeal, which was denied on July 31, 1996. Petitioner then petitioned the California Supreme Court for review of the decision of the Sixth District Court of Appeal. The California Supreme Court denied the petition for review on October 23, 1996. Petitioner seeks review from the California Supreme Court's denial of her Petition for Review.

MISSTATEMENTS OF FACT

Pursuant to Supreme Court Rule 15.2 Respondents submit that the following are misstatements of fact or law raised in Petitioner's Petition for Writ of Certiorari:

Petitioner states on page 5 of his Petition for Writ of Certiorari:

> "The next morning Anderson went to Mr. Holifield's office where he told her that because of her insulin reaction he did not feel that she

was physically able to work at his 7-Eleven store *any more*. (RT 1295:17)."

In Petitioner's direct testimony regarding the incident she stated that Respondent's concern with her inability to work was temporary and directly related to the fact she had just been hospitalized. Petitioner's testimony then reflects that she was added onto the schedule within several days. (RT 1296:8-18).

Petitioner then states that "when Anderson accused him of firing her because of her diabetes, he responded that before she could return to work *she* would need to arrange to have her physician contact Mr. Holifield to satisfy his concerns. Holifield admitted the above in his testimony. (RT 1565:2-1566:9; 1569.18)" Petitioner's construction of this paragraph creates the impression that there was some causal connection between the insulin reaction of October 12th and the subsequent discussion between Petitioner and Respondent Holifield of November 10, 1991. The two incidents are unrelated. Furthermore, the citation provided by Petitioner does not support the above statement.

Petitioner also made the following statement: "The next morning, November 10, 1991, Anderson met with Holifield and explained Lologo's assault and battery upon her the night before. No sooner had she finished when Holifield told Anderson of his "intent to terminate her." (RT 1562:1-11).

Not only is Petitioner's statement unsupported by the citation provided, it is also patently false. Petitioner's citation to the Reporter's Transcript actually reads as follows:

"between Mrs. Lologo and Denise, did you not?

A. Yes.

Q. And was it not you feeling that because of Denise's diabetic condition, she had to take more frequent breaks than the normal employee?

A. To some degree, and permission has been given to do this.

Q. And was it not, sir, your understanding that Denise would sometimes be seen taking a break in the cooler and you felt that this was quite possibly related to her diabetes?"

Obviously, Petitioner's cite to the record is incorrect and contains testimony unrelated to the conversation between the parties of November 10, 1991. The relevant portion of the proceedings dealing with the Respondent's alleged intent to terminate Petitioner are as follows:

7 BY MR. LOFTUS: Q. Did you use the
8 words with Denise in your conversation with her on
9 November 10, 1991, quote: It is my intent to
10 terminate you, but before I do I want to discuss a
11 number of things with you, end of quote?
12 HOLIFIELD: I do not recall making that exact statement.
13 Q. Do you deny making that statement?
14 A. I know that I advised Ms. Anderson that there
15 were some problems with her performance that I need to
16 discuss with her.
(RT 1565:7-16)

Finally, Petitioner stated that "Approximately two weeks after her termination an extensive recorded statement was taken from Holifield with his knowledge by an

attorney-private investigator retained by Anderson's counsel in which Holifield admitted firing Anderson, but asserted that the firing was due to employment deficiencies that she demonstrated, some of which he admitted might have been due to her diabetes."

Conspicuously absent from the above quotation is Petitioner's attempt to cite corresponding reference to the Reporter's Transcript. This is simply because the record on appeal is devoid of any supporting evidence that Petitioner was terminated, nor that the reason for her alleged termination was her diabetes.

REASONS FOR DENYING THE WRIT

I. Petitioner has not presented the Court with an important or compelling issue for review.

Supreme Court Rule 10 provides in pertinent part:

> "Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."

In other words, the Court will grant a petition for writ of certiorari only when a substantial issue is present. In Supreme Court Rule 10, the Court outlines several factors, which although are not controlling, do indicate the character of the reasons the Court considers in deciding to grant certiorari:

(a) Cases in which a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same

important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This is simply not an appropriate case for review by the Supreme Court. This matter does not involve a situation where a state court has decided an important federal question that conflicts with the decision of another state court of last resort. Nor does this matter involve a state court deciding an important question of federal law which is in conflict with relevant decisions of the Supreme Court. Rather, this case involves an isolated incident by a less than competent trial attorney to address his inability to properly represent his client. The record is replete with examples during the trial in which the trial court advised Petitioner's attorney as to how to introduce evidence. In almost every one of those occasions, Petitioner's attorney either simply ignored the direction or did not properly follow California trial procedures.

II. The constitutional issue presented by Petitioner as a basis for requesting review by the Court is without merit.

After spending great lengths in discussing the purported errors committed by first the trial court, and then the subsequent ratification of those errors by both the California Court of Appeal and the California Supreme Court, Petitioner shortly discusses the jurisdictional basis for requesting certiorari. She states that while her research has failed to disclose any cases which address the alleged bias and competency issues of a trial court, she does believe that under the rule of *Aetna Life Insurance v. Lavoie* (1986) 475 U.S. 813, 106 S.Ct. 1580, a proper constitutional basis is present for review.

In *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 106 S.Ct. 1580, the Court decided that a member of the Alabama Supreme Court's financial interests in relation to related pending litigation created bias on the part of the Justice. The presence of such bias on the part of a Supreme Court Justice violated the litigant's due process rights. Specifically, the Court held that the Alabama Supreme Court Justice interest was "direct, personal, substantial and pecuniary." The Court went on to hold that based on this factual finding, the Justice's participation in the case violated the Petitioner's constitutional due process rights.

In this case, Petitioner has made *no* allegations of the trial court's pecuniary interest in the litigation. Rather, Petitioner has only alleged bias on the part of the trial court against either himself or Petitioner directly.

In *Aetna* the Court discussed the issue of constitutional due process rights in cases of alleged bias or prejudice by a judge *without* a pecuniary interest. In dicta, the Court found that the disqualification of a judge on such allegations of bias or prejudice would be "constitutionally required" in only the "most extreme cases." 475 U.S. 821, 823. Petitioner cited this portion of the *Aetna* decision in support of his proposition. Such authority is not controlling.

In sum, the Court decided the due process issue in *Aetna* based not on the petitioner's allegations of the Justice's prejudice or bias against the party, but rather based on the existence of the Justice's financial stake in similar pending litigation. Consequently, the Petitioner's reliance on *Aetna Life Insurance Co. v. Lavoie* to support his proposition is misplaced.

III. In the absence of Petitioner's due process argument, Petitioner's remaining contentions of error only involve the Court of Appeal's alleged misapplication of federal law.

Finally, Petitioner asserts that the Court of Appeal for the Sixth District failed to apply proper rules enunciated by federal decision for determining whether Petitioner had made a prima facie case of disability discrimination particularly in light of the trial judge's premature sua sponte nonsuit of most of her claims. Supreme Court Rule 10 states in pertinent part that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The Court of Appeal for the Sixth District examined Petitioner's assertions of the trial court's improper application of law regarding her claim of disability discrimination. First, the Court made a factual finding that the Petitioner had not been terminated. This finding was well supported by the evidence. Secondly, Petitioner asserted that she was discriminated in her privileges of employment by discriminatory acts other than discrimination. These acts included not permitting the Petitioner to return to work, demanding a medical release, taking Petitioner off the cash register and criticizing her work performance. The Court of Appeal analyzed each contention and found that the evidence presented did not support the claim.

Assuming arguendo that Petitioner's arguments are valid and supported by the record on appeal, at the very most, the alleged errors committed by the Court of Appeal are mere misapplications of a properly stated rule of law. As such, absent any additional basis for review, these alleged errors are not a proper basis for the granting of a Petition for Writ of Certiorari.

CONCLUSION

In conclusion, this case is not one which should be granted certiorari before this Court. It does not involve important or substantial federal issues. In its most basic form, this case involved a clerk who quit her job at a 7-Eleven franchise and then sued her former employer for discrimination based on a disability. After the case was presented to the jury, the jury found that the former

employee was neither terminated nor discriminated against. During the trial, Petitioner's counsel made several errors in the presentation of evidence and the examination of witnesses. The trial court made every attempt to assist Petitioner's counsel in proper trial technique. Petitioner's counsel has now interpreted the trial court's actions as evidence of bias against either or both himself and his client. In attempt to obtain review by the Supreme Court, Petitioner has now couched her allegations of bias in terms of a constitutional deprivation of her right to due process.

Petitioner's Petition fails on several accounts. First, by asserting error by the District Court of Appeal in relation to the allegations of bias and prejudice on the part of the trial court, Petitioner has not presented an important and compelling federal issue to be heard by the Supreme Court. Absent such a compelling issue, the Court has the discretion to deny Petitioner's Petition for Writ of Certiorari. Secondly, Petitioner's attempt of presenting a constitutional due process issue by asserting bias and prejudice by the trial court is completely unsupported by decisional authority. Third, absent the existence of a compelling constitutional issue, Petitioner's argument consists merely of her disagreement with the Court of Appeal's application of the facts in this case to existing federal law. As such pursuant to Supreme Court Rule 10, the Court should only grant certiorari on rare occasions.

It is therefore respectfully requested that the Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

CHRISTOPHER C. CAYCE
Member, U.S. Supreme Court Bar
Counsel of Record for Respondents, Robert Holifield, and Lynne Holifield, d.b.a. 7-Eleven
200 E. Franklin Street, Suite 250
Monterey, CA 93940
(408) 373-2610